TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 148.

GEORGE H. SCOTT, PLAINTIFF IN ERROR,

vs.

PARRY L. DEWEESE (SUBSTITUTED FOR W. A. LATIMER), RECEIVER OF THE FIRST NATIONAL BANK OF SEDALIA, MISSOURI.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 22, 1900.

(17,540.)

(17,546.)

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the second day of May, A. D. 1898, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges, and Honorable Oliver P. Shiras, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-sixth day of November, A. D. 1897, a transcript of record, in pursuance of a writ of error directed to the circuit court of the United States for the western district of Missouri, was filed in the clerk's office of said circuit court of appeals in a certain cause wherein George H. Scott was plaintiff in error and W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, was defendant in error; which said transcript of record is in the words and figures following:

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the central division of the western district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1897, thereof, between W. A. Latimer, receiver of the First National Bank of Sedalia, Mo., plaintiff, and George H. Scott, defendant, a manifest error hath happened, to the great damage of the said George H. Scott, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the said United States circuit court of appeals for the eighth circuit, on or before the 30th day of November, A. D. 1897, to the end that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals for the eighth circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of September, in the year A. D. 1897. Issued at office, in Jefferson City, Missouri, with the seal of the said circuit court and dated as aforesaid.

H. C. GEISBERG, *Clerk.*

Allowed by—
JNO. F. PHILIPS, *Judge.*

No. 2170. United States circuit court, western district of Missouri, central division. W. A. Latimer, receiver, *vs.* Geo. H. Scott. Writ of error.

2 UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, Central Division, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, a duly certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

In testimony whereof I have hereunto set my hand, and affixed the seal of the circuit court of the United States for the central division of the western district of Missouri, at office in the city of Jefferson, Missouri, this 5th day of November, A. D. 1897.

H. C. GEISBERG, *Clerk.*

United States of America to W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, wherein George H. Scott is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John F. Philips, judge of the circuit court of the United States for the central division of the western district of Missouri this 30th day of September, 1897.

JNO. F. PHILIPS, *Judge.*

UNITED STATES OF AMERICA,
Western District of Missouri, Central Division, } *ss:*

I hereby acknowledge due service of the within citation, this 2d day of November, A. D. 1897.

WM. S. SHIRK,
Attorney for Defendant in Error.

No. 2170. United States circuit court, western district of Missouri, central division. W. A. Latimer, receiver, *vs.* Geo. H. Scott. Citation.

3 UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *sct:*

Pleas before the honorable circuit court of the United States in and for the central division of the western district of Missouri, at the March term, A. D. 1897, thereof, in the case of—

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant. } 2170.

Be it remembered that heretofore to wit, on the 10th day of September, 1895, there was filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, a petition, in words and figures following, to wit:

Petition.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, October Term, A. D. 1895.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Mo., Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Now comes W. A. Latimer, plaintiff in the above-entitled cause and complaining of George H. Scott defendant herein says, that on the 30th day of October, A. D. 1865, the First National Bank of Sedalia, Missouri, became incorporated and organized with a capital stock of $100,000, at Sedalia, Missouri, within the central division of the western district of Missouri, under the corporate name of the First National Bank of Sedalia, Missouri, under and in pursuance of an act of the Congress of the United States entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, A. D. 1864, and from that time until the 24th day of October, A. D. 1885, continued to do a banking business as such national bank at the city of Sedalia, county of Pettis, and State of Missouri.

That on said 24th day of October, A. D. 1885, the said First Na-

tional Bank of Sedalia, Mo., did extend the period of its succession as named in its articles of association, under and in pursuance of an act of the Congress of the United States entitled "An act to
4 enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, A. D. 1882, for a term of twenty years from the expiration of the period of succession named in its articles of association, to wit: twenty years from the 30th day of October, A. D. 1885, and that on said 24th day of October, A. D. 1885, the Comptroller of the Currency of the United States issued his certificate to the said First National Bank of Sedalia, Missouri, that it had complied with all the provisions of the act of the Congress of the United States aforesaid, to extend its period of existence for the period of twenty years as aforesaid, and did authorize said bank to have succession until the close of business on the 30th day of October, A. D. 1905.

That the said First National Bank of Sedalia Missouri, from and after the said 24th day of October, A. D. 1885, until the time hereinafter mentioned, continued to do a banking business as such national banking association at the said city of Sedalia, Missouri.

That on the 6th day of September, A. D. 1890, the said First National Bank of Sedalia, Missouri, in pursuance of and under the provisions of the acts of the Congress of the United States with reference to national banks, increased its capital stock in the sum of one hundred and fifty thousand dollars ($150,000.00), and that on the 17th day of January, A. D. 1891, the Comptroller of the Currency of the United States did certify that the said First National Bank of Sedalia, Mo., had increased its capital stock in the sum of one hundred and fifty thousand dollars, in accordance with the provisions of said act of the Congress of the United States, approved May the 1st, A. D. 1886, and did approve the said increase of its capital stock and did certify that it had been duly paid in as part of the capital of such association, and that thereafter the said First National Bank, of Sedalia, Missouri, did continue to do a banking business at the said city of Sedalia, Mo., with a capital stock of two hundred and fifty thousand dollars ($250,000.00), until the 4th day of May, A. D. 1894, hereinafter mentioned.

Plaintiff further states that on said 4th day of May, A. D. 1894, the said First National Bank of Sedalia, Missouri, became insolvent and failed and closed its doors and ceased to do business, and that on the 10th day of May, A. D. 1894, the plaintiff, W. A. Latimer, was duly appointed receiver of said First national bank by the Comptroller of the Currency of the United States, under the provisions and in pursuance of the laws of the United States, known as the "National banking acts." That he has duly qualified as such receiver, and is engaged in winding up the affairs of said bank, and as such receiver and officer, and in the discharge of his duties as such receiver, he brings this suit.

5 And plaintiff further states, that in winding up and settling the affairs of said bank, for the purpose of paying the debts of said association, the Comptroller of the Currency of the United States determined that it was necessary to enforce the individual

liability of the stockholders thereof, and to collect from them an amount equal to 75 per cent. of the amount of their stock held in said bank at par value, and that on the 13th day of April, A. D. 1895, the said Comptroller of the Currency of the United States, acting under the laws of the United States, aforesaid, duly made an assessment and requisition upon the shareholders of said First National Bank of Sedalia, Missouri, for the sum of one hundred and eighty-seven thousand five hundred dollars ($187,500.00), to be paid by them ratably, on or before the 15th day of May, A. D. 1895, and did then make demand upon the said George H. Scott, defendant herein, for seventy-five dollars, upon every share of the capital stock of the said First National Bank of Sedalia, Missouri, held or owned by said defendant at the time of the failure of said First national bank as aforesaid, payable on or before the said 15th day of May, A. D. 1895, and did direct the plaintiff, W. A. Latimer, as receiver as aforesaid, to enforce the payment of said amount.

Plaintiff further states that at the time of the failure and suspension of said bank as aforesaid, the defendant herein was the owner and holder of fifty shares of the capital stock of the said First National Bank of Sedalia, Missouri, of the par value of one hundred dollars ($100.00) per share each; that the amount ratably due by said defendant as such shareholder under the assessment made by the Comptroller of the Currency aforesaid, for the settlement of the contracts, debts and liabilities of said banking association is three thousand seven hundred and fifty dollars, and that by the virtue of the assessment and requisition of the Comptroller of the Currency of the United States as aforesaid, the defendant became and is liable under the provisions of the law aforesaid for the payment of said sum.

That on or about the 17th day of April, A. D. 1895, the plaintiff, W. A. Latimer, as receiver of said First national bank aforesaid, notified the defendant herein of the assessment and requisition of the Comptroller of the Currency of the United States aforesaid, and demanded the payment of the said sum on or before the said 15th day of May, A. D. 1895, but that the defendant herein has not paid said sum or any part thereof.

Wherefore, plaintiff as such receiver of the said First National Bank of Sedalia, Missouri, prays judgment against the de-
6 fendant for the said sum of $3,750, together with 6 per cent. interest thereon from the said 15th day of May, A. D. 1895, as well as for his costs herein laid out and expended.

WM. S. SHIRK,
Attorney for Plaintiff.

Upon said petition appears the following waiver of process and entry of appearance, to wit:

Appearance.

U. S. OF AMERICA,
Western District of Western Division of Missouri.

I, George H. Scott, the defendant named in the within petition, do hereby enter my appearance to said action, and I do hereby waive the issue of process upon said petition, as well also as the service of the same upon me by a United States marshal.

Witness my hand this — day of September, A. D. 1895.

GEO. H. SCOTT.

And afterwards, at a regular stated term of said circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of March, A. D. 1896, the following proceedings were had in this cause on the 24th day of March, A. D. 1896, to wit:

Continuance.

W. A. LATIMER, Receiver,
vs.
GEORGE H. SCOTT. } 2170.

By consent of counsel, this cause is continued until the next term of this court.

And afterwards, at the October term, A. D. 1896, of said circuit court, begun and held on the third Monday of October, A. D. 1896, the following further proceedings were had in said cause on the 20th day of October, A. D. 1896, to wit:

Submission and Judgment.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo.,
vs.
GEORGE H. SCOTT. } 2170.

This day comes the plaintiff by his attorney, Wm. S. Shirk, Esq., and the defendant by his attorney, W. M. Williams, Esq., when a jury waiver is filed, cause tried by the court sitting as a jury,
7 evidence heard, cause submitted on pleadings and proofs; on consideration whereof, the court finds for the plaintiff and assesses the damages by him sustained at the sum of ($4,068.75) four thousand and sixty-eight dollars and seventy-five cents. It is therefore now considered that the plaintiff W. A. Latimer, receiver of the First National Bank of Sedalia, Mo., recover of and from the defendant, George H. Scott, the said sum of four thousand and sixty-eight dollars and seventy-five cents ($4,068.75), the damages so as aforesaid by the court assessed, together with his costs herein laid out and expended, and that (—) have execution thereof.

Note on margin of the record:

MEMO.—This judgment was set aside, April 19th, 1897. See order page 214, of this record. H. C. Geisberg, clerk.

The jury waiver filed as aforesaid is in words and figures as follows, to wit:

Jury Waiver.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, October Term, 1896.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Mo., Plaintiff,
vs.
GEO. SCOTT, Defendant. } (2170.)

Come now the parties to the above-entitled cause by their respective attorneys, and waive a trial in this cause by jury and agree that the same may be heard by the court.

WM. S. SHIRK,
Att'y for Plaintiff.
W. M. WILLIAMS,
Att'y for Defendant.

And afterwards, at the March term, A. D. 1897, of said circuit court, begun and held on the third Monday of March, A. D. 1897, the following further proceedings were had in said cause on the 19th day of April, A. D. 1897, to wit:

Former Judgment Set Aside; Case Redocketed; Leave to Amend Petition; Answer and Motion for Judgment Filed; Motion Submitted.

W. A. LATIMER, Receiver,
vs.
GEORGE H. SCOTT. } 2170.

This day comes the plaintiff by his attorney, Wm. S. Shirk, Esq., on whose motion, and in accordance with a stipulation by counsel this day filed, it is ordered that the judgment heretofore ren-
8 dered in this cause be set aside, and said cause be reinstated on the docket. And on further motion of the plaintiff, leave is granted him to amend his petition by interlineation, and such amendment having been made, the defendant files his answer, and plaintiff files a motion for judgment upon the pleading, which motion is by the court taken under advisement.

Which stipulation so filed is in words and figures as follows, to wit:

Stipulation to Set Aside Judgment, etc.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, March Term, A. D. 1897.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo., Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Whereas judgment was rendered in the above-entitled cause at the October term, A, D. 1896, of this court, through a misunderstanding between the plaintiff and the defendant, and the plaintiff being willing that the defendant should have a trial of his case upon the merits—

It is therefore hereby stipulated and agreed, by and between the parties hereto, that an order may be entered herein, reinstating this cause upon the docket, and setting aside the judgment heretofore rendered herein by default, and that the defendant shall have leave to file his answer herein, on the 1st day of the next term of this court.

In witness whereof, the undersigned attorneys for plaintiff and defendant have hereunto set their hands, this the 19th day of March, 1897.

WM. S. SHIRK,
Att'y for Plaintiff.
W. M. WILLIAMS,
Att'y for Defendant.

Which answer, filed as aforesaid is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

9 Defendant answering the complaint of plaintiff herein, admits the incorporation of the First National Bank of Sedalia, Missouri, as alleged in the complaint, and the extension of the period of its incorporation as therein alleged, and that it continued to do a banking business as such corporation during the time and at the place in the complaint alleged, and that said corporation became insolvent and failed and closed its doors. Defendant admits that plaintiff was appointed receiver of said corporation on May 10th, 1894, as alleged in the complaint, and that he

has duly qualified as such receiver; and admits that in the winding up and settling of the affairs of said bank, the Comptroller of the Currency determined that it was necessary to enforce the individual liability of the stockholders thereof, and to collect from them ratably, the amount of seventy-five per cent. of the par value of the stock held by them in said bank, and that a demand was made and a direction given to plaintiff as stated in the complaint.

Further answering, defendant alleges that on September 6th, 1890, said bank, by a vote of the owners of two-thirds of the capital stock of said bank, voted to increase said capital stock by the sum of one hundred and fifty thousand ($150,000.00) dollars; that said bank notified the Comptroller of the Currency that the whole amount of said increase had been paid in, and that on January 17th, 1891, said comptroller (who then knew that more than the entire capital of said bank was loaned, directly and indirectly, to its president, and that the amount so loaned had been constantly increasing for several years up to said January 17th, 1891, by adding the interest which was not paid to the notes evidencing said loans or the renewals thereof, and who based his action wholly upon the notification from said bank) issued his certificate, stating that the amount of the increase of capital was one hundred and fifty thousand ($150,000.00) dollars, and that the same was paid in and did approve the said increase of its capital stock.

That thereafter and until May 4th, 1894, said bank continued to do business with a pretended capital of two hundred and fifty thousand ($250,000.00) dollars.

Defendant further alleges that in September, 1890, the officers of said bank informed and represented to defendant as follows: That said bank contemplated increasing its capital stock from one hundred thousand ($100,000.00) dollars to two hundred and fifty thousand ($250,000.00) dollars. That said intended increase of capital was made desirable on account of the increasing business of said bank; that said bank was in a flourishing condition and earning large dividends upon its capital stock, and then had a surplus of fifty thousand ($50,000.00) dollars over and above its capital stock and all liabilities; that from said surplus such dividends would be declared as would make each of the two thousand five hundred (2,500) shares of stock worth the sum of one hundred and eight ($108) dollars.

And defendant alleges that relying upon the representations made as aforesaid, defendant who in no other way ever held or owned any stock in said bank, subscribed for fifty shares of said proposed increase of the one hundred and fifty thousand ($150,000) (—) and in October, 1890, deposited in said bank the sum of five thousand four hundred ($5,400.00) dollars, and it was then and there the understanding between defendant and said bank that said sum of fifty-four hundred ($5,400.00) dollars was to be held by said bank, and applied in payment of defendant's subscription for said fifty shares, when all of said proposed increase was subscribed for and the money therefor paid in to said bank, and the issues of the shares of said increase could be legally made; that said bank gave

to defendant a receipt for said sum of five thousand four hundred ($5,400.00) dollars; that about October 25th, 1890, said bank delivered to plaintiff a certificate for fifty (50) shares of its said pretended increase of capital. That said bank then, falsely and fraudulently and with intent to deceive defendant, represented to defendant that the said increase of capital had been lawfully made, and that the full amount thereof had been subscribed for and paid in in full, and defendant, deceived by said representations, and relying thereon, accepted and retained said certificate, and that defendant held and claimed as owner, said certificate thereafter and until the closing of said bank, and in the years 1891 and 1892 received and retained alleged dividends aggregating eighteen per cent. of the par value of said certificate; that said alleged dividends were paid out of the money paid as aforesaid by defendant to said bank.

And defendant further alleges, that as a matter of fact, in September, 1890, and for many months prior thereto and ever afterwards said bank was wholly insolvent and had no surplus whatever, and at the time said pretended increase of capital was made, all of the capital of said bank had been lost, and its liabilities irrespective of its capital stock and alleged surplus, exceeded its assets, and the bank was earning no dividends upon its capital, and said pretended increased stock was never of any value or validity whatever, and only about two-thirds of said increase was ever paid in, and the officers of said bank made false entries in the books and records of said bank, for the purpose of showing an apparent
11 surplus in the bank's assets, and declared a dividend to themselves therefrom, and turned in said dividend to the bank in pretended payment for a large part of said increased stock, and the whole transaction was a sham, and was done for the purpose of bolstering up an insolvent institution, by obtaining large sums of money from the subscribers for the increased stock, and for the further purpose of watering the capital stock of said bank and permitting the officers thereof to appropriate to themselves, without paying anything therefor, a large part of said pretended increase, of all of which defendant had no knowledge whatever, until long after said bank had closed its doors on May 4th, 1894, nor had defendant any information whatever that could in any way have created a suspicion thereof. Defendant further alleges that the books and records of said bank during all the time after said October 25th, 1890, have shown, and it has been made by them to appear that all of said pretended increase of capital was paid in. That from a time prior to said October 25th, 1890, until said bank closed, the books and records of the bank were systematically, skilfully and cunningly falsified by said officers, and so kept that the defendant could not by the utmost diligence ascertain the true condition of said bank.

That defendant, as soon as he discovered that said increase of stock was not fully paid in, disclaimed and denied that he was or ever had been a stockholder of said bank.

Except as hereinbefore admitted or qualified, the defendant denies

the said complaint and each and every matter, allegation, statement and thing therein contained, and each and every part thereof.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed with his costs.

STEVENS, O'BRIEN, COLE AND
ALBRECHT, HAYDN S. COLE,
Attorneys for Defendant.

STATE OF MISSOURI, } ss:
County of Pettis, }

George H. Scott, being duly sworn deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which
12 are therein stated upon information and belief, and that as to those matters that he believes it to be true.

GEORGE H. SCOTT.

Subscribed and sworn to before me this 13th day of February, 1897.

[SEAL.] HARMON R. SCOTT,
Notary Public, Pettis County, Missouri.

My com. expires June 1st, 1898.

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the 20th day of April, A. D. 1897, to wit:

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo., } 2170.
vs.
GEORGE H. SCOTT.

Answer Amended by Leave; Motion Sustained and Judgment.

This day comes the plaintiff by W. S. Shirk, Esq., his attorney, and the defendant by his attorney, W. M. Williams, Esq., when defendant, by consent, amends his answer by interlineation, and the court having considered the motion to enter judgment on the pleadings, it is ordered that said motion be sustained; and the court being of the opinion that the allegations set up in defendant's answer are no defense to the plaintiff's cause of action, the court finds that the defendant is indebted to the plaintiff on the cause of action set out in the petition, in the sum of four thousand one hundred and eighty-one and $\frac{87}{100}$ dollars ($4,181.87). It is therefore considered by the court that the plaintiff, W. A. Latimer, receiver of the First National Bank of Sedalia, Mo., have and recover of and from the defendant, George H. Scott, the sum of four thousand one hundred and eighty-one dollars and eighty-seven cents ($4,181.87), the amount so as aforesaid found to be due, together with the costs herein expended, and that execution issue therefor.

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the said 20th day of April, A. D. 1897, to wit:

W. A. LATIMER, Receiver,
vs.
GEORGE H. SCOTT. } 2170.

Leave to File Bill of Exceptions.

On motion of defendant leave is granted him to file his bill of exceptions within ten days from this date.

13 And afterwards, on the 30th day of June, A. D. 1897, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

W. A. LATIMER, Receiver, etc.,
vs.
GEORGE H. SCOTT. } 2170.

Bill of Exceptions Filed.

This day comes the defendant by his attorney, and files his bill of exceptions in this cause, which is signed by Hon. Elmer B. Adams, who presided at the trial; and is ordered to be filed and made part of the record herein. Memo. by clerk: This bill of exceptions was in fact filed April 22, 1897, but by inadvertence omitted from the record, and therefore the above entry is made *nunc pro tunc* as of said last-named date.

Which bill of exceptions filed as aforesaid is in words and figures as follows, to wit:

In the Circuit Court of the United States, Central Division of Western District of Missouri, March Term, 1897.

W. A. LATIMER, Receiver of the First National Bank of Sedalia,
Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Bill of Exceptions.

Be it remembered that at the March term, 1897, and on the 19th day of April, 1897, the plaintiff filed a motion for judgment notwithstanding the answer in words and figures as follows, to wit:

Which motion is as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, March Term, A. D. 1897.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Mo., Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

Motion for Judgment.

Comes now the plaintiff herein by his undersigned attorney of record, and moves the court to render judgment in his favor upon the pleadings herein, for the following reasons, to wit:

1st. Because upon the pleadings the plaintiff is entitled to a judgment as prayed for in his petition.

14 2nd. Because defendant's answer filed herein, admits all the facts alleged in plaintiff's petition, which constitute the plaintiff's cause of action, and the allegations of new matter in said answer contained, do not constitute any defense whatever to the cause of action alleged in said petition.

3rd. Because the plaintiff is entitled to judgment as prayed for in his petition, upon the statements and admissions of the defendant's answer filed herein.

WM. S. SHIRK,
Att'y for Plaintiff.

Which said motion was on the 20th day of April, 1897, sustained by the court and to the ruling of the court in sustaining said motion the defendant at the time duly excepted and now tenders this his bill of exceptions and prays that the same be signed and sealed by the court and made part of the record which is accordingly done this 21st day of April, 1897.

ELMER B. ADAMS, *Judge.* [SEAL.]

The following is the order appointing the Hon. Elmer B. Adams, United States district judge for the eastern district of Missouri, to hold and assist in holding the United States circuit and district courts in the western district of Missouri.

Order Appointing Judge Adams to Hold Court in Western District.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In my judgment the public interests require the designation and appointment of a district judge of this circuit to hold and assist in holding the circuit and district courts of the United States for the western district of Missouri, in place and in aid of the district judge of that district. I do, therefore, by these presents designate and appoint the Honorable Elmer B. Adams, United States district judge for the eastern district of Missouri, to hold or assist in holding the circuit and district courts of the United States in and for the several divisions of the western district of Missouri, at the times and

places appointed by law for holding said courts, from the date hereof until the 1st day of July, A. D. 1897, in place and in aid of the Honorable John F. Philips, United States district judge for the said western district of Missouri.

Witness my hand and seal this 17th day of October, A. D. 1896.

AMOS M. THAYER,
Circuit Judge.

15 And afterwards, on the 29th day of September, A. D. 1897, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

W. A. LATIMER, Receiver, etc.,
vs.
GEORGE H. SCOTT. } 2170.

This day comes the defendant, by his attorney and files an assignment of errors herein:

Which assignment of errors so filed is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank, Sedalia, Missouri, Plaintiff, Defendant in Error,
vs.
GEORGE H. SCOTT, Defendant, Plaintiff in Error.

Assignment of Errors.

In the above-entitled proceedings in error from the circuit court of the United States for the central division of the western district of Missouri, the plaintiff in error makes the following assignment of errors:

First. That the court erred in rendering judgment on the pleadings in favor of the plaintiff, defendant in error, and against the defendant, plaintiff in error.

Second. That the court erred in holding that the facts alleged in the answer did not constitute any defense to the cause of action stated in the petition, and that the answer admitted all the facts alleged in the petition which constitute the plaintiff's cause of action.

Wherefore, the plaintiff in error asks and prays that your honorable court of appeals of the eighth circuit of the United States reverse the judgment in this action.

STEVENS, O'BRIEN, COLE AND ALBRECHT,
HAYDN S. COLE,
H. F. STEVENS,
Attorneys for Plaintiff.

16 And afterwards, on the 30th day — September, A. D. 1897, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

W. A. LATIMER, Receiver, etc.,
vs.
GEORGE H. SCOTT. } 2170.

This day there is filed an appeal bond in this case and an order in words and figures following, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, in Vacation,

W. A. LATIMER, Receiver of the First National Bank,
Plaintiff,
vs.
GEORGE H. SCOTT, Defendant. } 2170.

Writ of Error Allowed; Bond Approved.

This day comes the defendant and presents to the court a writ of error to reverse the judgment heretofore rendered against him, a citation directed to the plaintiff, and an appeal bond, whereupon the said writ of error is allowed, citation signed, and it is ordered that the appeal bond be approved and filed and made a part of the record in this cause.

Kansas City, Mo., Sept. 30th, 1897.

JNO. F. PHILIPS, *Judge.*

Which appeal bond filed as aforesaid is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Plaintiff, Defendant in Error,
vs.
GEORGE H. SCOTT, Defendant, Plaintiff in Error.

Appeal Bond.

Know all men by these presents, that we, George H. Scott, as principal, and Harmon R. Scott, as sureties, are held and firmly bound unto W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, in the sum of two hundred and fifty ($250) dollars to be paid to the said W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, and which payment well and truly to be made, we bind ourselves, our heir, executors, and administrators jointly and severally by these presents.

Witness our hands and seals this 23rd day of September, 1897.

17 The conditions of the above obligation are such, that whereas, at the April, 1897, adjourned term of the March, 1897 term of the circuit court of the United States for the central division of the western district of Missouri, in a suit wherein W. A. Latimer as receiver of the First National Bank of Sedalia, Missouri, was plaintiff and George H. Scott was defendant, a judgment was rendered in favor of said plaintiff and against said defendant who has obtained a writ of error from said court and a citation directed to the said W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, citing and admonishing him to be and appear in the United States court of appeals of the eighth circuit sixty days after the date of said citation.

Now therefore, if the said defendant George H. Scott, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good said appeal then this obligation to be void, otherwise to be and remain of full force and effect.

GEO. H. SCOTT. [SEAL.]
HARMON R. SCOTT. [SEAL.]

Signed, sealed and delivered in presence of—
CHARLES VAN ANTWERP.

STATE OF MISSOURI, } ss:
County of Pettis, }

Be it known, that on this 23 day of September, A. D. 1897, before me personally appeared Geo. H. Scott and Harmon R. Scott, to me known to be the same persons described in and who executed the foregoing bond, and each for himself acknowledged the same to be his own free act and deed.

CHARLES VAN ANTWERP,
Notary Public.

STATE OF MISSOURI, } ss:
County of Pettis, }

Geo. H. Scott and Harmon R. Scott, the sureties named in and who executed the foregoing bond, being first duly sworn doth each for himself depose and say, that he is a resident and freeholder of the State of Missouri and worth the amount of five hundred dollars, above his debts and liabilities, and exclusive of his property exempt from execution.

—— ——. [SEAL.]

Subscribed and sworn to before me this 23rd day of September, 1897.

CHARLES VAN ANTWERP,
Notary Public.

My term expires April 13th, 1899.

The above bond approved:
JNO. F. PHILIPS, *Judge.*

18 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Western District of Missouri,* } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the central division of the western district of Missouri, do hereby certify that the foregoing writing is a full, true and complete transcript of the record and proceedings in the cause wherein W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, is plaintiff, and George H. Scott is defendant (No. 2170) as fully as the same remain on file and of record in my office.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 5th day of November, A. D. 1897.

H. C. GEISBERG, *Clerk.*

Filed Nov. 26, 1897.

JOHN D. JORDAN, *Clerk.*

19 (*Appearance for Plaintiff in Error.*)

And on the third day of December, A. D. 1897, an appearance of counsel for the plaintiff in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

GEORGE H. SCOTT, Plaintiff in Error, *vs.* W. A. LATIMER, Receiver, &c. } No. 1026.

The clerk will enter our appearance as counsel for the plaintiff in error.

STEVENS, O'BRIEN, COLE & ALBRECHT.

H. F. STEVENS.
HAYDN S. COLE, *Counsel.*

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, &c. Appearance. Filed Dec. 3, 1897. John D. Jordan, clerk. H. F. Stevens, Haydn S. Cole, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the twenty-second day of December, A. D. 1897, an appearance of counsel for the defendant in error was filed in the

clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver, &c. } No. 1026.

20 The clerk will enter my appearance as counsel for the defendant in error.

WM. S. SHIRK,
Att'y for Def't in Error.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, &c. Appearance. Filed Dec. 22, 1897. John D. Jordan, clerk. William S. Shirk, counsel for def't in error.

(*Order of Submission.*)

And on the tenth day of May, A. D. 1898, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause, in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

TUESDAY, *May* 10, 1898.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri. } No. 1026.

In error to the circuit court of the United States for the western district of Missouri.

This cause, having been called for hearing in its regular order, was argued by Mr. H. F. Stevens, for plaintiff in error, and submitted on briefs by defendant in error.

Thereupon the cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of October, A. D. 1898, an opinion of said United States circuit court of appeals was filed in the clerk's office of said court in the following words, to wit:

21 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1898.

GEORGE H. SCOTT, Plaintiff in Error, *vs.* W. A. LATIMER, Receiver of the National Bank of Sedalia, Missouri, Defendant in Error. | No. 1026. In Error to the Circuit Court of the United States for the Western District of Missouri.

Mr. H. F. Stevens (Mr. John D. O'Brien, Mr. Haydn S. Cole and Mr. Armand Albrecht were with him on the brief) for plaintiff in error.

Mr. William S. Shirk filed brief for defendant in error.

Before Sanborn and Thayer, circuit judges, and Shiras, district judge.

This action was brought in the United States circuit court for the western district of Missouri, by W. A. Latimer, receiver of the First National Bank of Sedalia to recover from George H. Scott, an assessment made by the Comptroller of the Currency upon the capital stock of the named bank, it being claimed that Scott owned and held fifty shares of the stock. In the answer filed it was admitted that the bank had been duly incorporated in 1865; that it closed its doors and was put in liquidation in May, 1894, the plaintiff, Latimer, being appointed receiver on May 10th, 1894; that the comptroller had determined that it was necessary to enforce the individual liability of the stockholders in favor of the creditors, and to that end had made an assessment of seventy-five per cent. upon the stock held in the bank, and that payment thereof had been demanded of the defendant, Scott. As matters of defense it was averred in the answer that on September 6, 1890, the bank, by a vote of the owners of two-thirds of the capital stock, voted to increase the capital from $100,000 to $250,000; that said bank notified the comptroller that the whole amount of said increase had been paid in, and on January 17, 1891, the comptroller, basing his action wholly upon the notification from the bank, issued his certificate stating that the amount of the increase was $150,000 and that the same was paid in and was approved by him as comptroller.

It is further averred that in September, 1890, the officers of the bank represented to the defendant, Scott, that the bank proposed to increase its capital stock by the addition thereto of $150,000;

22 that this increase was made desirable on account of the increasing and flourishing condition of the business of the bank, which was earning large dividends and had a surplus then earned which would make the shares, including the proposed increase, worth $108 per share; that relying upon these representations the defendant subscribed for fifty shares of the proposed increase, and in October, 1890, deposited in the bank the sum of $5,400, it being then and there the understanding between defendant and the bank that said sum, so deposited, was to be held by the bank and applied in payment of defendant's subscription for fifty shares, when all the proposed in-

crease was subscribed and paid for; that about October 25, 1890, the bank, with intent to deceive defendant, falsely represented that the whole amount of the proposed increase of the capital stock had been subscribed and paid in, and thereupon issued to defendant a certificate for the fifty shares of stock by him subscribed for; that defendant, relying upon these representations, accepted the certificate and held and claimed the same as owner until after the closing of the bank, and in the years 1891 and 1892 received and retained alleged dividends amounting to eighteen per cent.; that as a matter of fact in September, 1890, and for many months prior thereto and ever afterwards the bank was insolvent, its liabilities exceeding its assets; that only about two-thirds of the proposed increase of the capital stock was ever paid in; that the officers of the bank made false entries on the books for the purpose of showing an apparent surplus and declared a dividend thereon, turning in the same in pretended payment of a large part of said increased stock; that the whole transaction was a sham and fraud, of which the defendant had no knowledge until after the bank closed its doors in May, 1894; that the books of the bank were so kept that the defendant could not by the utmost diligence ascertain the true condition of the bank and that as soon as defendant discovered that the increase of stock was not fully paid in, he disclaimed that he was or ever had been a stockholder in the bank.

Upon the filing of this answer, the plaintiff, Latimer, moved for judgment in his favor on the pleadings on the ground that the answer admitted all the facts necessary to sustain his action in the first instance, and that the matters set up as a defense were insufficient to defeat the claim sued on. The court held the motion to be well taken and gave judgment accordingly, and thereupon the case was brought to this court by writ of error, it being contended by the plaintiff in error that the facts averred in the answer showed that there had not been a valid increase of the capital stock, because the whole amount of the proposed increase of $150,000 had not been paid in, and further, that the facts averred in the answer entitled the defendant, upon discovery thereof, to rescind the contract of subscription on the ground of false and fraudulent representations made to him by the officers of the bank.

SHIRAS, district judge, after stating the case as above, delivered the opinion of the court:

From the foregoing statement of facts it appears that the plaintiff in error relies upon two distinct grounds of defense to the claim asserted by the receiver, the one being that the plaintiff in error
23 never was a stockholder in the bank because the whole amount of the proposed increase of the capital stock was not in fact paid in to the bank, and the other being that the plaintiff in error is entitled to rescind the contract by which he became a purchaser of stock in the bank for two reasons: First, because his subscription was conditioned upon the payment in full of all the proposed increase of stock, and second, because he was induced to

purchase the stock through fraudulent representations as to the pecuniary condition of the bank.

In support of the first defense it is contended that the fifty shares of stock subscribed for by the plaintiff in error were not valid shares because some of the shares subscribed for by other parties were not in fact paid for. This contention is based upon the provisions of section 5142, R. S., which are as follows:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association, shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association."

The theory of the plaintiff in error is that under the provisions of this section no share of a proposed increase of the capital stock can become a valid share unless all the shares of the proposed increase are subscribed for and are paid up in full, or in other words, if the shereholders should determine, with the approval of the Comptroller of the Currency, to increase the capital stock by the sum of $100,000 or one thousand shares of $100 each, and the entire number should be subscribed for and all the shares except one, should be fully paid for, and certificates should be duly issued therefor, the holders of such full-paid shares cannot be held to be stockholders because another person has failed to pay up one share by him subscribed for.

It cannot be denied that if the words, "and no increase of capital shall be valid until the whole amount of such increase is paid in" found in section 5142 are construed literally, support would be given to the contention of counsel for plaintiff in error, but it is an accepted and fundamental rule in the construction of statutes, that the several clauses thereof are not to be viewed as separate enunciations of the legislative will, to be literally construed without reference to other parts of the act, but on the contrary, each part must be construed with reference to the language and purpose of the entire act, so as to make all parts harmonize and conduce to the carrying out the general purpose of the statute and a literal construction of particular clauses will not be adopted, if the effect thereof would be to operate unjustly or to cause an absurd result.

Thus in U. S. *v.* Kirby, 7 Wall., 482, it is said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed
24 that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In Heydenfeldt *v.* Daney Gold Co., 93 U. S., 634, it was ruled: "If

a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected."

In Kohlsaat *v.* Murphy, 90 U. S., 153, it is declared that "In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same."

In Holy Trinity Church *v.* United States, 143 U. S., 457, it is said: "It is a familiar rule that a thing may be within the letter of a statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted and the reports are full of cases illustrating its meaning."

Under the doctrine of these cases, it is clear that in construing the particular clause of section 5142 which declares that no increase of the capital stock shall be valid until the whole amount of the increase shall have been paid in, we must regard not only the words of the special clause, but also the other provisions of the entire act, and the effect which a given construction will have upon the admitted or undoubted purposes of the statute as a whole. Turning to section 5140 we find it therein declared that in the original organization of national banks at least fifty per cent. of the capital stock must be paid in before the bank is authorized to commence business, the remaining fifty per cent. being payable in installments of at least ten per cent. payable at the end of each month succeeding to the date when it is authorized to commence business. The provisions of this section make it imperative that within six months from the time when the bank begins business, each share must be paid in full. If after the original stock has been paid in, it is deemed advisable to increase the capital stock provision is made therefor in section 5142 as amended by section 1 of the act of May 1, 1886, 24 Statutes at Large, 18. If it were permitted, for the purpose of increasing the capital stock, to issue shares without requiring the same to be fully paid up, two evil results would follow. So far as the public are interested the bank would be doing business on an apparent capital, which in fact it did not possess, or in other words the capital stock would be watered, and so far as the holders of the original full-paid stock are concerned, the new stock, though only partly paid for, would stand on an equality with the full-paid stock, both as to voting power and right to draw dividends, which would be manifestly unjust. These are the evils intended to be prevented by enacting that when an increase of the capital should be made, the increase should not become valid unless the whole amount thereof should be paid. The statute does not require that the proposed increase shall be subscribed by one person, or at one time, but it is permissible to have as many subscribers as there are new shares. Let it be assumed that the stockholders of a national bank, by a two-thirds vote, should determine to add one hundred thousand dollars to the capital stock and should obtain in a month a subscription for twenty-five thousand dollars, that is, for two
25 hundred and fifty shares, and the full par value thereof should be paid in, and this increase should be reported to the comp-

troller and be by him approved and certificates should then be issued to the subscribers.

Would not the holders of these certificates from that time forward be stockholders even though the remaining part of the voted increase never was subscribed for? Could the bank, after receiving the money for the shares, with the approval of the comptroller, be permitted to deny to the subscribers the rights of stockholders, simply because the full amount of the proposed increase had not been obtained?

In Aspinwall *v.* Butler, 133 U. S., 595, this general question was considered, it appearing in that case that on September 13, 1881, it had been voted to increase the stock of the Pacific national bank from $500,000 to $1,000,000; that Aspinwall became a subscriber for fifty shares of this proposed increase, and on October 1st, 1881, he paid to the bank the sum of $5,000, being the face amount of the fifty shares. Subscriptions for the proposed increase of $500,000 were not procured, and on December 13, 1881, the directors adopted a resolution reciting the failure to obtain subscriptions for $38,700 of the proposed increase, that the shares subscribed for and paid up amounted to $461,300, and directing notice to be sent to the comptroller that the capital had been increased by the last-named sum. The comptroller issued a certificate under date of December 13, 1881, to the effect that the capital stock of the bank had been increased in the sum of $461,300. Shortly afterwards the bank closed its doors, an assessment of one hundred per cent. was made by the comptroller, and it was held by the supreme court that Aspinwall was liable as a stockholder for the assessment on the fifty shares subscribed and paid for by him, although the original proposed increase of $500,000 was not obtained and although it appeared that Aspinwall did not know of the action of the directors in reducing the proposed increase to $461,300.

In construing the clause of section 5142, that declares that no increase shall be valid until the whole amount of the increase is paid in, the supreme court held that "the clause in question was intended to secure the actual payment of the stock subscribed, and so to prevent what is called watering of stock. The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?"

The contention of counsel for plaintiff in error upon this point is, that the clause found in section 5142 requiring the whole increase to be paid in full, is a condition affecting the subscription of each subscriber to the proposed increase, so as to make it conditional and not effective unless the entire amount of the proposed increase is subscribed and paid for, yet in Aspinwall *v.* Butler, page 607, in considering this exact question, the supreme court said: "There was no express condition that the individual subscription should be void

if the whole $500,000 was not subscribed; and in our judgment there was no implied condition in law to that effect."

26 In Thayer *v.* Butler, 141 U. S., 234, a subscriber to forty shares of the increased capital of the Pacific national bank, when sued for the assessment thereon, asked the trial court "to rule and hold the law to be as stated in the opinion of the supreme court of Massachusetts in Eaton *v.* Pacific National Bank, reported in 144 Mass. Supreme Court Reports, page 260, and to rule and hold that the vote of the directors of September 13, 1881, was in the nature of a proposition to stockholders to subscribe for 5,000 shares of new stock and to pay in for it $500,000; that it was necessary that the stock should all be taken and the money paid in before the new stock could be created; and that it was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the comptroller should certify that they had been done and approve the increase; and that the defendant paid the money to the bank on September 28, 1881, upon the implied condition that he should not be required to take new stock unless the proposed amount of 5,000 shares were created, and as this was not done the defendant did not become a shareholder in respect of the forty shares for which he paid September 28, 1881, and for the assessment upon which the plaintiff seeks to recover."

The trial court refused to so hold and rule and the supreme court declared that, "We are of opinion that the decision of the circuit court was correct, and that there is no error in the record."

The conclusion deducible from these decisions of the supreme court is that in cases wherein the stockholders of a national bank decide, with the approval of the comptroller, to increase the capital stock therein by the addition of a named amount, the clause found in section 5142 of the Revised Statutes to the effect that no increase shall be valid until the whole amount thereof is paid in, does not create a condition, express or implied, that shares subscribed and paid for in full are not to be held valid, unless the entire amount of the proposed increase is subscribed and paid for in full. In Delano *v.* Butler, 118 U. S., 634, and in McFarlin *v.* First National Bank, 68 Fed. Rep., 868, it is said: "Three things must occur to constitute a valid increase of the capital stock of a national banking association: First, that the association, in the mode pointed out in its articles, and not in excess of the maximum prescribed for by them, shall assent to an increased amount; that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and third, that the Comptroller of the Currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof and certify to the fact of its payment."

In thus defining the essentials to a valid increase of the capital stock of a national bank the supreme court in Delano *v.* Butler, and this court in McFarlin *v.* First National Bank, make use of the words found in section 5142, to the effect that to be valid the whole amount of the proposed increase must be paid, but in construing the meaning of the clause in question, thus quoted, we must follow the construc-

tion placed thereon by the supreme court in the subsequent cases of Aspinwall *v.* Butler, 133 U. S., 595; Pacific National Bank *v.* Eaton, 141 U. S., 227, and Thayer *v.* Butler, 141 U. S., 234, in all of which cases it was held, as already stated, that the clause
27 in question did not import into the stock subscriptions a condition, either express or implied, to the effect that the validity of the shares that were in fact subscribed and paid for in full was dependent on the question whether the whole of the proposed increase was subscribed and paid for. In the answer filed in this case it is averred that on September 6, 1890, the First National Bank of Sedalia, Mo., by a vote of the owners of two-thirds of the capital stock, voted to increase the capital of the bank by the addition thereto of the sum of one hundred and fifty thousand dollars; that subsequently the bank notified the comptroller that the whole amount of this increase had been paid in; that thereupon the comptroller, on the 17th of January, 1891, issued his certificate stating therein that the capital of the bank was increased in the sum of one hundred and fifty thousand dollars, the whole of the increase being paid in and that the increase of the capital stock was approved. It is also averred that the plaintiff in error in October, 1890, subscribed for fifty shares of the proposed increase and paid to the bank the sum of $5,400, and received, on or about October 25th, from the bank a certificate showing him to be the owner of the fifty shares. It is also averred that in fact only about two-thirds of the proposed increase was ever paid in, and relying on this averment that about one-third of the proposed increase had not been paid for, the claim is made that the shares which were subscribed and paid for in full, and for which certificates were duly issued, cannot now be held to be valid.

If this contention is well founded, then, as already said, it follows that if all the shares but one had been subscribed and paid for, nevertheless the holders of the certificates for the full-paid shares could not be heard to assert that they were the owners of valid shares, which would be a most unjust result. If this is the true meaning of the statute, it is made possible for parties in control of a national bank with the approval of the comptroller to authorize the increase of the capital stock, to obtain subscription and payment in full for all the shares but one or two, and then, if that be desirable, to deny to the holders of these full-paid certificates, any participation in the control of the bank, or in case the bank becomes insolvent, to shield these holders of certificates from liability to creditors. Certainly a construction of the statute having such results should not be adopted unless the statute as a whole imperatively demands it. According to the provisions of section 5142 as originally adopted, the articles of association of each bank might provide for an increase of the capital stock, the maximum of such increase in each case to be determined by the comptroller and named in the articles. By section 1 of the amendatory act of May 1, 1886, 24 Statutes at Large, 18, it is declared: "That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase

its capital stock in accordance with existing laws, to any sum approved by the said comptroller, notwithstanding the limit fixed in its original articles of association and determined by said comptroller."

Under this amendatory statute, the maximum of increase is not the sum named in the articles of association, but repeated increases may be made from time to time by affirmative vote of the holders
28 of two-thirds of the capital stock, approved by the comptroller.

Thus in a given instance the vote of the requisite number of shareholders, approved by the comptroller, to increase the capital stock by the addition of $100,000 makes that amount for the time being, the maximum of the increase that can be lawfully made, and of necessity it authorizes the addition of sums less than the maximum. Such action, taken under the provisions of the amendatory act of 1886, means that the shareholders, by a proper vote, have authorized the increase of the capital stock by amounts not exceeding in the aggregate the maximum sum of $100,000 and that the comptroller has approved such action.

Each subscription for portions of such increase when paid up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions a condition that the subscriber, paying his subscription in full, cannot become a holder of valid stock unless the maximum amount of the proposed increase is subscribed and paid for.

The action of the stockholders in voting to increase the capital stock by a given sum, though approved by the comptroller does not in any sense increase the capital stock. It authorizes an increase, but does not make it. The increase is created by the procurement of subscriptions to the capital stock, the payment of each subscription in full and the issuance of the comptroller's certificate under the provisions of section 5142.

The clause providing that no increase shall be valid until the whole amount of such increase is paid in does not refer to the maximum amount of the authorized increase, but to the actual increase created by a subscription for a given number of shares. To make the subscription valid, this clause requires that it shall be paid in full, the object being to prevent the issuance of shares which are only partly paid up, but it does not require in order that validity may exist with respect to shares subscribed for and paid up in full, that the whole amount of the authorized increase should be subscribed and paid for. To so hold would be to rule directly contrary to the supreme court in Aspinwall *v.* Butler and Thayer *v.* Butler, *supra*, wherein it was held that the statute did not create a condition in each subscription to the stock, that the same should not become effectual unless the entire proposed increase was subscribed and paid in, and it therefore follows that if it be true that only two-thirds of the proposed increase of the capital stock was subscribed and paid for, as is claimed in the answer, that fact would not invalidate the shares subscribed and paid for in full and for which certificates were issued to and received by the subscribers and under

which they exercised the privileges and received the benefits of shareholders for a period of over three years.

The remaining grounds of defense relied on by plaintiff in error are based upon the assumed right to rescind the contract of subscription to the capital stock of the bank, on the ground that such subscription was procured through false representations made to plaintiff in error touching the actual pecuniary condition of the bank and to avoid the effect of the acceptance by the plaintiff in error of the shares of stock issued to him on the ground that it was falsely represented to him that the whole amount of the proposed increase of $150,000 had been paid in.

29 It will be borne in mind that this is not an action on behalf of the bank based upon the original contract of subscription, but it is a suit wherein the creditors of the bank, represented by the receiver, are seeking to enforce the liability which the statute imposes upon those who occupy the position of stockholders in a national bank, and the question is whether it is open to the plaintiff in error after the bank has become insolvent and has been put into liquidation to disclaim liability as a stockholder after having occupied that position for nearly four years. This general question was considered by this court in the case of Newton National Bank *v.* Newbegin, 74 Fed. Rep., 135; 20 C. C. A., 339, and after a consideration of the leading cases dealing with the subject, the conclusion reached was stated as follows:

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs unless the case is one in which the stockholder has exercised due diligence and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, upon one pretense or another, and to assume the role of creditor is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription, as well after as before the company ceases to be a going concern."

As already stated, the answer herein filed admits that the plaintiff in error in fact became a subscriber for fifty shares of the stock in September, 1890; that he paid into the bank the full value thereof and received the certificate issued therefor; that he received

all the dividends declared thereon and that when the bank closed its doors and was put in liquidation in May, 1894, he had not taken any action indicating a purpose to disclaim being a stockholder in the association.

Even if the situation is such that there exists a right of rescission as against the bank, such right cannot be asserted as against the creditors. If it be true that the subscription to the stock was obtained by false representations touching the pecuniary condition of the bank, that did not make the contract absolutely void, but only voidable at the option of the subscriber, and therefore when the bank was put in liquidation, the corporate creditors had the right to enforce the statutory liability against all persons who were then stockholders.

30 It is settled that if one knowingly permits his name to appear on the books of a national bank as a shareholder, and accepts the benefits of the position, he will be held liable to the responsibilities thereof in favor of creditors whose rights have intervened during the time his name thus appears as a stockholder. Chubb *v.* Upton, 95 U. S., 165; Keyser *v.* Hitz, 133 U. S., 138; Veeder *v.* Mudgett, 95 N. Y., 295; Stutz *v.* Handley, 41 Fed. Rep., 531; Pauly *v.* State Loan and Trust Co., 165 U. S., 606.

Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder.

The right of the creditors to enforce the statutory liability against shareholders in a national bank is not dependent upon the terms of the stock subscription contract. Thus in Scovill *v.* Thayer, 105 U. S., 143, it is said: "The stock held by the defendant was evidenced by certificates of full-paid shares; it is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders, was just as binding as if it had been expressly authorized by the charter. * * * But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. Sawyer *v.* Hoag, 17 Wall., 610; New Albany *v.* Burke, 11 Wall., 96; Burke *v.* Smith, 16 Wall., 390.

"The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. Wood *v.* Dummer, 3 Mass., 308; Mumma *v.* Potomac Co., 8 Pet., 281; Ogilvie *v.* Knox Insurance Co., 22 How., 387; Sawyer *v.* Hoag, *supra*. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders."

The liability sought to be enforced in this case is not one created by a contract existing between the corporation and the stockholders,

but is one created by statute in favor of creditors and not in favor of the corporation. It is a liability which cannot be affected, discharged or released by any action taken by the corporation or by the combined action or agreement of the corporation and its stockholders. Thus in Delano *v.* Butler, 118 U. S., 634, it appeared that the stockholders, in order to meet the liabilities of the bank, had made an assessment of one hundred per cent. upon the capital stock which was paid in, but the bank was ultimately compelled to go into liquidation and the comptroller made an assessment upon the stockholders under the provisions of sec. 5151 of the Revised Statutes. The supreme court held that the payment of the assessment made by the stockholders did not relieve them from liability for the assessment made by the comptroller, it being said that, "under sec. 5151 the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the
31 bank. The assessment under that section is made by the authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably."

It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on part of the corporation or of the corporation and its stockholders.

It is created for the benefit of the creditors and no action on part of the bank can estop the creditors from enforcing their rights in this particular. Upon whom does the statute impose the liability? In National Bank *v.* Case, 99 U. S., 628, and Bowden *v.* Johnson, 107 U. S., 251, it was ruled that the actual or beneficial owner of the stock would be liable, and that this liability could not be evaded by the device of transferring the title to a third person, who might be financially irresponsible. In Pauly *v.* State Loan and Trust Company, 165 U. S., 606, it is said: "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is on the ground that by allowing his name to appear upon the stock list as owner, he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If as between creditors and the person assessed, the latter is not bound by that representation the list of shareholders required to be kept for the inspection of creditors and others, would lose most of its value. * * *

"As already indicated, those may be treated as shareholders within the meaning of sec. 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as own-

ers,' in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors from claiming that they were not in fact owners."

In the answer filed in this case it is admitted that the plaintiff in error subscribed for fifty shares of stock, accepted the certificates issued therefor, received the dividends paid thereon, and thus for nearly four years appeared as a stockholder on the books of the bank, and certainly these facts entitle the creditors to enforce, as against the plaintiff in error, the liability which the statute imposes upon those persons who allow themselves to be held out as owners of the capital stock of a banking association. To escape this liability the plaintiff in error pleads that he was induced to become a stockholder in the bank by reason of certain false representations made to him by the officers of the bank, with respect to the financial condition of the association, which were of such a character that he is now entitled to rescind the contract of subscription. Granting it to be true that if a suit were now brought by the bank, or on its behalf, to enforce the contract of subscription against the plaintiff in error, he might successfully defend the action on the ground that he had been induced to enter into the contract by false rep-
32 resentations on part of the bank, does it follow that this defense is available against the present action? This suit is not in favor of the bank, but is on behalf of the creditors, and is not to enforce any provision of the contract of subscription existing between the bank and the plaintiff in error, but is based upon the liability imposed by the statute, in favor of creditors against those who knowingly assume the position of stockholders, and which may exist, although no contract of subscription was ever entered into between the bank and the holder of the capital shares.

Even as between the bank and the plaintiff in error the contract of subscription was not void. It may have been voidable at the option of the plaintiff in error, but until so avoided, it remained in force. When the bank closed its doors and was put in liquidation, the plaintiff in error was in fact a shareholder and so appeared upon the books of the association. While it may be true that his subscription to the capital stock had been obtained under such circumstances that he might, at his option, rescind the same, yet he had not done so when the bank failed, and although he may not be chargeable with negligence in not earlier discovering the falsity of the representations made to him by the officers of the bank, yet the fact remains, that when the association was put in liquidation, and when the rights of the creditors became fixed, he not only appeared upon the books of the bank as the owner of fifty shares of the capital stock, but in truth he had for nearly four years held the certificate issued therefor, had received the dividends declared and had exercised all the rights of a shareholder.

These facts clearly bring the plaintiff in error within the liability imposed by the statute upon those who assume the appearance of stockholders in a national bank, and the liability thus created cannot be defeated by showing that the plaintiff in error was induced

to accept the position of stockholder by false representations made by the officers of the bank.

These officers do not represent the creditors nor can the latter be made responsible for their acts. If A., being the owner of fifty shares of the capital stock in a bank, should induce B. to purchase the same through false representations with respect to the financial condition of the bank, the stock being transferred to B. on the books of the association, could B., if the bank subsequently failed, escape liability to the creditors on the ground that he had been induced to purchase the stock through the false representations made by A.? If, under these circumstances, A. should sue B. to enforce payment for the stock, it would be open to B. to defeat the action by proof of the fraud, and it would be open to B. to sue A. for the damages caused him by the deceit practiced on him, but it certainly would not be open to B. to defeat the liability created by the statute, in favor of creditors, as against the shareholders by showing that he had been induced to purchase the stock by the false representations made by A. Does it make any difference in the result to show that A. was an officer in the bank for whose acts or representations the association might be made responsible? If it be the law, as it is declared to be by the supreme court in Scovill *v.* Thayer, *supra*, that the bank cannot, by any contract it may make with the subscribers to its capital stock, relieve the latter from the statutory liability
33 created in favor of creditors, how can it be held that this liability can be defeated by representations made by the bank or its officers?

Admitting to the fullest extent that the representations made to the plaintiff in error, by the officials of the bank, were such, that upon the discovery thereof, he would have the right to rescind the contract of subscription, yet it must be true that until he exercised the right of rescission, he would, as to creditors, be in fact a stockholder.

The answer admits that when the bank was put in liquidation, the plaintiff in error had not rescinded the contract of subscription and nothing he could thereafter do would defeat the rights of the creditors, which must be measured by the condition of affairs existing when liquidation was entered upon. It is admitted in the answer that from October, 1890, until in May, 1894, the plaintiff in error held the certificate of stock issued to him for fifty shares, claiming the same as owner, and that he received the dividends paid in the years 1891 and 1892. These acts of the plaintiff in error the creditors had an absolute right to rely upon, as evidencing the fact that during that period of time he was a shareholder in the bank, and it is not now open to the plaintiff in error, by asserting or exercising the right of rescission, which may exist between himself and the bank, to defeat the right of the creditors, which is based upon the liability which the statute imposes upon all persons who allow themselves to be held out as shareholders in a national bank. As already said, this suit is not based upon the contract of subscription between the bank and the plaintiff in error and is not, therefore,

an action wherein the issue can be made as to the voidability of that contract as between the bank and the shareholders.

The suit is on behalf of the creditors, to enforce a statutory liability in which the bank has no interest, a liability which was not created by any contract to which the bank was a party; a liability which it is beyond the power of the bank to modify, release or discharge and a liability which, if once called into existence by the act of one assuming the position of a stockholder, cannot be defeated save by the creditors or by some one acting in their behalf. Potts *v.* Wallace, 146 U. S. 689–703.

The law presumes that the creditors of a corporation become, and continue to remain such, in reliance upon the liability imposed upon the stockholders by statute, and it would be a fraud upon the creditors to permit one who has for years occupied the position of a stockholder and has received the benefits thereof, to repudiate liability to the creditors on the ground, that as between himself and the corporation, his contract of subscription to the capital stock was one voidable at his option.

In cases like the present wherein it appears that for years a person has actually sustained the relation of a stockholder in a banking association, although under circumstances which may justify a rescission of the contract of stock subscription, as between the subscriber and the corporation, the just protection of creditors whose rights have intervened during this period, requires it to be held that, as against creditors, the one who held the position of stockholder cannot escape the statutory liability by rescinding the subscription contract, after the bank has been put into liquidation.

The judgment of the circuit court is therefore affirmed.

34 SANBORN, circuit judge, dissenting:

There are two reasons why I am unable to assent to the views expressed and the conclusion reached by the majority of the court in this case. They are that, in my opinion, the fraudulent misrepresentations which induced the plaintiff in error to contract for the purchase of his stock entitle him to repudiate that purchase and to rescind his contract, and that the pretended increase of the capital of the bank was invalid and he never became liable as a stockholder because only two-thirds of the whole amount of the increase was ever paid in. Rev. Stat., sec. 5142.

The case made by the pleadings is this: In 1890 the plaintiff in error was a stranger to the bank, free from all connection with or relation to it, and ignorant of its financial standing and character. The bank was insolvent, was earning no dividends and had no surplus. To induce the plaintiff in error to purchase some shares of a proposed increase of its worthless stock, the bank falsely represented to him that it was solvent and in a flourishing condition, that it was earning dividends on its stock, that it had a surplus of $50,000 above its capital stock and liabilities, and that its stock was worth a premium of $8.00 per share. By these misrepresentations it induced him to subscribe for 50 of the 1,500 shares it proposed to issue and to deposit with it $5,400 under an understanding that this

money should be applied to the payment for this stock when the whole amount of the increase of stock was subscribed for and paid in. The entire amount was subscribed for, but only two-thirds of this increase was ever paid in. The bank then appropriated the plaintiff's $5,400 in payment for the 50 shares of stock, sent him a certificate of it, and induced him to play the role of a stockholder by the false representation that the entire increase had been paid in, and by the same false representation induced the Comptroller of the Currency to issue his certificate and approve the increase. At the same time it so falsified its books that the plaintiff in error could not by the utmost diligence learn the true condition of the bank. All this was done in October, 1890. But the bank continued to falsify its books, and to conceal the truth so that the plaintiff in error had no suspicion of the fraud and could not discover it by any reasonable diligence until after he had received two dividends on his supposed stock and the bank had closed its doors in 1894. Here is a case where a bank by the grossest false misrepresentations has induced a stranger to pay $5,400 and to incur a liability for $5,400 more, for a certificate of worthless stock that furnished no consideration for the contract. It is difficult to conceive of a grosser fraud. Upon every principle of equity and justice this subscriber was entitled to repudiate this purchase, to rescind his contract, and to recover back his money as soon as be discovered the facts. Contracts for stock in a corporation which are induced by fraud create no obligation, and the victim of the fraud has the right to their abrogation. Vreeland *v.* N. J. Stone Co., 29 N. J. Eq., 190; Thompson's Liability of Stockholders, sec. 142.

It is true that this contract was voidable and not void and that the duty to rescind it as soon as the facts were discovered, or as soon as they could be discovered with reasonable diligence, was imposed upon this subscriber. But he avers in his answer, and this
35 allegation stands admitted in this record, that the bank, systematically, skillfully, and cunningly falsified its books, concealed the facts, and continued its false representations until it closed in May, 1894, so that he could not, with the utmost diligence discover the fraud, and so that he had no suspicion of it. How can he be said to be guilty of such negligence or laches as will deprive him of relief in the face of these facts? The statutes of the State of Missouri, where this fraud was perpetrated, provide that an action for relief on the ground of fraud may be brought at any time within five years after the discovery by the aggrieved party, within ten years, of the facts constituting the fraud (Rev. Stat. Mo., 1889, sec. 6775), and it is a familiar maxim that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it. Scheftel *v.* Hays, 58 Fed. Rep., 457, 460; 7 C. C. A., 308, 312; 19 U. S. App., 220, 226; Kelley *v.* Boettcher, 85 Fed. Rep., 53, 63. I am unable to escape the conviction that under this state of facts this subscriber was entitled to rescind the purchase of, and to repudiate the liability upon this stock.

It is conceded in the opinion of the majority that as against the bank the plaintiff in error would be entitled to this relief, but it is

insisted that by his delay in seeking it, and by his receipt of two dividends he is estopped from obtaining it as against the receiver, because the latter represents the creditors of the bank as well as the bank itself. In support of this view the cases of Chubb *v.* Upton, 95 U. S., 665; Veeder *v.* Mudgett, 95 N. Y., 295; Stutz *v.* Handley, 41 Fed. Rep., 531; Pauly *v.* State Loan & Trust Co., 165 U. S., 606, and Keyser *v.* Hitz, 133 U. S., 138, are cited. But there seems to me to be a radical difference between the standing of the subscriber in this case and that of the subscriber in Chubb *v.* Upton, Keyser *v.* Hitz, Upton *v.* Tribilcock, 91 U. S., 45; Sanger *v.* Upton, 91 U. S., 56, 63, and other cases of that class. In this case the plaintiff in error was induced to purchase by a gross and continuing fraud which kept him in ignorance of the facts, and rendered it impossible for him to discover them by the use of reasonable diligence. In those cases the subscriptions were not induced by fraudulent, continued and successful misrepresentations and concealments of material facts which lulled suspicion and hid the truth, but the defences were the defective exercise of the power to issue stock as in Chubb *v.* Upton, the defective transfer of stock as in Keyser *v.* Hitz and Sanger *v.* Upton, 91 U. S., 63, a misrepresentation as to the legal effect of the stock certificate which purported to be non-assessable, which was held to be a misrepresentation of a matter of law and unavailable, as in Upton *v.* Tribilcock, 91 U. S., 45, 50, the fact that an increase of stock was irregularly, but not fraudulently issued and knowingly retained as in Veeder *v.* Mudgett, 95 N. Y., 295, 310, and Stutz *v.* Handley, 41 Fed. Rep., 531, that subscribers or pledgees knowingly held themselves out as owners of stock "in such way and under such circumstances as upon principles of fair dealing will estop them as against creditors from claiming that they were not in fact owners" as was said in speaking of supposed cases in Pauly *v.* State Loan & Trust Co., 165 U. S., 606, 623, and that subscriptions were knowingly ratified and adopted after full knowledge of the falsity of the statements which induced them, as in Ogilvie *et al. v.* Knox Ins. Co. *et al.*, 22 How., 380, 390. In these cases the subscribers or holders were held to be estopped as against
36 the creditors because they continued to act as stockholders after they knew, or by the exercise of reasonable diligence might have known the facts. None of them were tricked into the place of stockholders and retained there by a continued fraud which kept them in ignorance of, and rendered it impossible for them to learn the truth by the exercise of reasonable diligence, as the plaintiff in error was in the case at bar. This is the radical distinction between the cases referred to and that in hand. It separates by as wide a difference the cases of Scovill *v.* Thayer, 105 U. S., 193; Sawyer *v.* Hoag, 17 Wall., 610; Albany *v.* Burke, 11 Wall., 96; Burke *v.* Smith, 16 Wall., 390; Mumma *v.* Potomac Co., 8 Pet., 281; Delano *v.* Butler, 118 U. S., 634; National Bank *v.* Case, 99 U. S., 628; Bowden *v.* Johnson, 107 U. S., 251, and Potts *v.* Wallace, 146 U. S., 689, 703, cited in the opinion of the majority. It is held in those cases that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders

but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability were estopped from defeating creditors of the corporation in their attempts to hold them as such. It is indeed repeatedly said in those cases that the property of an insolvent corporation and the liability of the stockholders is a trust fund pledged for the benefit of the creditors, and that is equally true of every insolvent person. But in none of these cases, in no case cited by the court or the counsel, was the holder of the stock duped into his place and liability by undiscoverable fraud. In none of them did any court hold that money obtained from, or liability imposed upon a stockholder by fraud which he could not discover, was a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? In the opinion of the majority this question is propounded: "If A., being the owner of fifty shares of the capital stock in a bank, should induce B. to purchase the same through false representations with respect to the financial condition of the bank, the stock being transferred to B. on the books of the association, could B., if the bank subsequently failed, escape liability to the creditors on the ground that he had been induced to purchase the stock through the false representations made by A.?" In my opinion, in the absence of other proof of an estoppel *in pais*, the question should be answered in the affirmative, because fraud avoids every purchase, every sale, every contract, as against every one but an innocent purchaser or creditor who has taken his place in reliance upon it. That, however, is not the question in this case. The question here is: Could the assignee or receiver of B.'s property, in the case of the sale supposed, enforce a non-negotiable obligation of A., which B. had induced him to make by the fraudulent misrepresentations? Regarding the answer to this question it seems to me there ought not to be two opinions. If a debtor procures goods by false representations, the rights of the defrauded vendor to recover them are always superior to those of the creditors of the vendee or the receiver who represents them. *A fortiori* if, by the fraudulent representations by which he sells his goods, he procures an assumption of liability by the vendee, the right of the latter to a rescission of the sale and a cancellation of the obligation is superior to
37 the rights of either his creditors or his receiver to enforce it. Beach on Receivers, § 704; Litchfield Bank *v.* Peck, 29 Conn., 384, 386; Bussing *et al. v.* Rice, 2 Cush., 48; Rohrbough *v.* Leopold, 68 Tex., 254, 258; Root *v.* French, 13 Wend., 570, 573; Barnard *v.* Campbell, 58 N. Y., 73; Slagle *v.* Goodnow, 45 Minn., 531; Oswego Starch Factory *v.* Lendrum, 57 Ia., 573, and cases there cited; Atwood *v.* Dearborn, 1 Allen, 483; Devoe *v.* Brandt, 53 N. Y., 462, 465; Benjamin on Sales, § 433, note I. Why is not the right of one who is induced by the fraudulent misrepresentations of a bank to buy its stock, to a rescission of that sale and a release of the liability it imposes, superior to the claims of its creditors or its receiver to enforce them? Fraud vitiates every contract based upon it. A contract of

subscription for, or purchase of, stock, is no exception to the rule, and the relation and liability of a stockholder cannot exist without the existence, or an estoppel from denying the existence, of the contract of subscription or purchase. It is true, as is shown in Scovill *v.* Thayer, and other cases cited, that the stockholders' liability and the maintenance of the action upon it is not dependent upon the terms of the contract of subscription where those terms are in conflict with the law or the statute, as was the contract that the stock was non-assessable, but the existence of a valid contract of subscription or an estoppel from denying its existence is a *sine qua non* to the existence of the liability and the maintenance of the action. Without it there can be no stockholder, and hence, no liability of a stockholder. And, where the contract is induced by fraud, and is rescinded without negligence or delay as soon as the facts constituting it are discovered, it is as though it had not been, and there remains neither contract nor stockholder, nor liability of a stockholder. In all the cases that have been cited in which the liability was enforced a contract of subscription or purchase which had not been induced by fraud, or which had been ratified after its discovery, existed, and the stockholders in those cases were held because, as was well said in Pauly *v.* State Loan & Trust Co., 165 U. S., 606, 623, they were the real owners of the stock or held themselves out or "allowed themselves to be held out as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not in fact, owners." But one who is induced by a continuing fraud to subscribe for, or to purchase and to retain stock is not estopped as against creditors on principles of fair dealing from repudiating the contract and liability when he discovers the facts, because he has never knowingly or negligently deceived them to their injury. So are the American authorities that have treated of such fraudulent contract, (Newton National Bank *v.* Newbegin, 40 U. S. App., 1; 20 C. C. A., 339; 74 Fed. Rep., 135; Florida Land & Improvement Company *v.* Merrill, 52 Fed. Rep., 77, 80; Upton *v.* Tribilcock, 91 U. S., 54; Winters *v.* Armstrong, 37 Fed. Rep., 516, 517; Duffield *v.* Barnum, 31 N. W. Rep. (Mich.), 310, 316), and they clearly mark and strongly emphasize the distinction between the cases relied upon in the opinion of the majority and that now before us. In all the cases cited by the majority either a valid contract of subscription or purchase existed, or the stockholders were estopped from rescinding a voidable contract because they had acted as such after they knew or might have known the facts upon which they relied to avoid it. In the case at bar the contract was
38 induced by fraud and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained because he did not know, and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge or means of knowledge. It may be that upon a trial of this case evidence could be adduced which would estop him from repudiating the purchase of this stock, but upon the admitted allegations of his answer here, there are several reasons why I

think he is not barred as against this receiver and the creditors he represents from obtaining the relief he seeks.

An estoppel arises only when one knowingly or negligently represents to another who is ignorant and relies and acts upon the representation to his injury that a fact or condition exists, which has no existence. An essential element of such an estoppel is a wilful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be some moral turpitude or some breach of duty. Henshaw *v.* Bissell, 18 Wall., 255, 271; Bank *v.* Farwell, 58 Fed. Rep., 633, 636, 639; 7 C. C. A., 391, 394, 396; 19 U. S. App., 256, 262, 265; N. Y. Life Ins. Co. *v.* McMaster, 87 Fed. Rep., 63, 66. Mr. Justice Field, speaking of this estoppel in Henshaw *v.* Bissell, says: "For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result." As long as the plaintiff in error did not know and could not learn by the use of reasonable diligence the facts constituting the fraud upon him until after the bank had incurred its debts to all its creditors, he was not guilty of any breach of duty to them or of any negligence to their rights, or of any intent to deceive them and they cannot sustain the plea of an estoppel against him.

Another requisite ingredient of an estoppel by conduct or declarations is, that the party claiming its benefit has acted upon it in such a way, that he will be injured if the natural inference from it is denied. The deceit of the victim of the representations and consequent damage from their denial are indispensable to the existence of the estoppel. N. Y. Life Ins. Co. *v.* McMaster, 87 Fed. Rep., 63, 66; Bonsack Machine Co. *v.* S. F. Hess & Co., 68 Fed. Rep., 119, 135; 15 C. C. A., 303, 318; 25 U. S. App., 315, 341. There is nothing in this record to show that any creditor of this bank loaned his money to it or deposited his funds with it in reliance upon the fact that the plaintiff in error appeared to own fifty shares of stock in it, and I am aware of no presumption of law or of fact which makes it our duty to reach this conclusion in the absence of pleading and proof.

Moreover an estoppel does not operate in favor of everybody. No one can set it up or derive any benefit from it, who has not been misled by the misrepresentation or conduct to his injury. Ketchum *v.* Duncan, 96 U. S., 659, 666; The Howard Carroll, 14 U. S.
39 App., 506; Harris *in re*, 57 Fed. Rep., 243, 246; 6 C. C. A., 320. If it were conceded that a creditor of the bank who was induced to become such by his reliance upon the fact that the plaintiff in error appeared to have fifty shares of stock could estop him from escaping from a liability thereon, that estoppel could not

inure to the benefit of any creditor who was not induced to become such, in reliance upon that fact. If there were some creditors who were, and some who were not induced to become such in reliance upon this fact the receiver could not derive any benefit from it in this suit because he can enforce only the common rights and claims of all the creditors, and he cannot plead or urge the personal claims of individual creditors which are not common to all. He cannot enforce an estoppel which may belong to one-third or one-tenth of the creditors and distribute the proceeds he derives from it among them all. The right of a creditor to enforce such an estoppel is a personal right which no one but the creditor misled by the representation can urge and the receiver cannot avail himself of it, unless all the creditors have been induced to loan their money to this bank by the apparent ownership of its stock by the plaintiff in error. There is neither plea nor evidence of such a state of facts in this case. Indeed the pleadings show that when this stock was subscribed, the bank owed more than the value of all its assets. A state of things once shown to exist is presumed to continue, and where, as in this case, it appears that a bank owed more than the value of all its property in 1890 and again in 1894, the presumption that it had paid all of its old creditors and become indebted to new ones during this four years would be contrary to the common experience and observation of business men, violent and unreasonable. The strong probability is, that most of the creditors of this bank loaned their money to it prior to 1890, and they surely cannot plead an estoppel. Whether they did or not, I am strongly of the opinion that the plaintiff in error is entitled to pleading and proof that some or all of these creditors loaned their money in reliance upon his ownership of the stock before an estoppel against him is found. "A creditor who has been defrauded by misrepresentation of the real capital of the company has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it." Scovill *v.* Thayer, 105 U. S., 143, 151.

Finally, even if the fact were established that a creditor loaned his money since 1890 in reliance on the ownership of the stock of the plaintiff in error, I am unable to perceive any right or equity in his claim superior to that of the plaintiff in error. In that case they were both deceived by the same fraud. They were both kept in ignorance of the actual facts by the same falsifications and devices, and I see no reason why one of the victims of such a wrong should be allowed to prey upon the other. The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing condition, and of its increase of stock which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case why should not the right of the pur-

chaser of stock who suffers the greater wrong, be equal to that of the creditor who suffers less? Neither of them was aware of the fraud. Neither of them did or could discover it, until both were injured. Neither of them knowingly or negligently deceived the other, and in my opinion neither of them is entitled to estop the other from undoing the fraud from which they suffer. Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep., 135, 140; 20 C. C. A., 339, 344; Florida Land, etc., Co. *v.* Merrill, 52 Fed. Rep., 77, 80; 2 C. C. A., 629, 632; 2 U. S. App., 434, 439, 440; Upton *v.* Tribilcock, 91 U. S., 45, 54; Winters *v.* Armstrong, 37 Fed. Rep., 512, 516, 517; Duffield *v.* E. T. Barnum Wire & Iron Works, 31 N. W. Rep. (Mich.), 310, 316.

The other question in this case is, does the subscriber for shares in the proposed increase of the capital stock of a national bank under an understanding with the bank that his money on deposit there shall be used to pay his subscription only when the entire increased capital is paid in, become a stockholder of the bank and liable as such, when all the increased capital is subscribed for, but only two-thirds of it is paid in, and the bank appropriates his money to its own use, sends him a certificate of stock and falsely represents that the entire increased capital has been paid in? I cannot persuade myself that this question should be answered in the affirmative. The answer pleads that the plaintiff in error agreed to purchase his stock on the express condition that he should not take it, and his $5,400 on deposit with the bank should not be used to pay for it until the entire $150,000 of proposed increase of capital was paid in. The condition was never fulfilled, the increased capital was never paid in, and upon familiar principles the subscriber never became a stockholder. The fact that the bank falsely represented to him that the condition had been complied with, and so falsified its books that its falsehood appeared to be the truth, and the subscriber believed it, cannot change the fact or its legal effect. It was the fact of payment and not the bank's false statement regarding it that conditioned the contract of subscription, and, as that condition was never fulfilled, and as the subscriber never learned and never could learn until after the failure of the bank that it was not complied with, so that he did not waive it, he never became a stockholder by the express terms of his contract of purchase.

Moreover, I am unable to concur in the view that the proper construction of the provision of sec. 5142 of the Revised Statutes that "no increase of capital shall be valid until the whole amount of such increase is paid in" is that every increase of capital is valid, any part of which is paid in, and I am unable to see how the judgment in this case can be sustained without adopting exactly that interpretation of this clause of the statute.

In Delano *v.* Butler, 118 U. S., 634, 649, and in McFarlin *v.* First Nat. Bank, 68 Fed. Rep., 868, 872, it was held that "three things must concur to constitute a valid increase of the capital stock of a national banking association; 1st, that the association, in the mode pointed out in its articles and not in excess of the maximum prescribed by them, shall assent to an increased amount; 2nd, that the whole amount of the proposed increase shall be paid in as part of

the capital of such association; and 3rd, that the Comptroller
41 of the Currency by his certificate, specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment." I do not understand that the Supreme Court has modified or departed from this holding in the later cases of Aspinwall *v.* Butler, 133 U. S., 595; Pacific Nat. Bank *v.* Eaton, 141 U. S., 227, and Thayer *v.* Butler, 141 U. S., 234. In each of those cases the amount of increase originally proposed was $500,000, but only $461,300 was actually subscribed and paid in. When this had been done, the bank modified its proposal, limited the amount of its increase to $461,300, notified the Comptroller that this amount had been subscribed and paid in, and he issued his certificate for, and approved the increase, not of $500,000, but of $461,300. In this state of facts, the court held the increase valid. The key to these decisions is found however in the holding of that court in Delano *v.* Butler that the three conditions of the act of Congress had been exactly fulfilled. It said: "In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of the Currency by his certificate approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000 subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the Comptroller of the Currency." 118 U. S., 649. I agree, that, if the Bank of Sedalia, after it had proposed the increase of $150,000, had obtained subscriptions and payment in full for $100,000 of increased stock, and had then limited its increase to that amount, reported that fact and that the $100,000 had been paid in, and had obtained from the comptroller his certificate and approval of an increase, not of $150,000, but of $100,000, the new stock would have been valid. But could that bank issue valid increased stock for $150,000 when only $100,000 was actually paid in, in the teeth of the plain declaration of the statute that no increase shall be valid until the whole amount of such increase is paid in? Could it issue valid new stock for $150,000 when only $1,000 or $100 was actually paid in? That is the real question in this case. The pleadings concede that the bank proposed an increase of $150,000 that this amount was subscribed for, that the comptroller was induced by the false representations of the bank to certify and approve an increase of that amount, and that only two-thirds of that amount was actually paid in.

The evils against which that clause of the statute was directed were, that if the new stock was issued without payment of the entire amount of the increase, the stock would be watered, the bank would be doing business on an apparent capital which it did not

in fact possess, and the stockholders who paid for their stock would be wrongfully placed on an equality with those who held stock that was only partly paid for, or was not paid for at all. In the cases arising out of the failure of the Pacific national bank these
42 evils did not result, because the $461,300 actually paid in was the limit of the increase finally fixed by the bank and certified and approved by the comptroller. But in the case at bar they have resulted. The increase proposed by the bank and the increase certified was $150,000, while only $100,000 was paid in. The stock was watered. The apparent capital was $50,000 more than the real capital. Every stockholder who paid for his stock was put on an equality with those who had not paid at all, or who had paid in part only. The pretended increase of the capital of this bank falls clearly and literally within the plain provision of the act of Congress, "No increase of capital shall be valid until the whole amount of such increase is paid in," and in Aspinwall *v.* Butler, 133 U. S., 608, the Supreme Court decided it in that case when it said, "This clause would have been violated by an issue of $500,000 of new stock when only $461,300 was paid in, but not by an issue of the exact amount that was paid in."

That is this case. New stock to the amount of $150,000 was issued while only $100,000 was paid in, and because this pretended increase of capital has produced the very evils which the statute was enacted to prevent, because it violates the plain terms of the act of Congress, and because the Supreme Court so held in Aspinwall *v.* Butler, I have been forced to the conclusion that the new stock issued by this bank was invalid, and that the plaintiff in error is not liable upon it as a stockholder. I concede, as was held in Aspinwall *v.* Butler and in Thayer *v.* Butler, 141 U. S., 234, that a subscription to a proposed increase of stock contains no implied condition that the entire increase proposed shall be subscribed and paid for, because it is discretionary with the bank and the comptroller to reduce or change that amount at any time before it is certified and approved by the latter. But in my opinion every such subscription is made upon the express condition clearly set forth in the statute that it shall not be valid if the amount of the increase of capital finally reported to the comptroller and certified and approved by him exceeds the amount actually paid in for the new stock. Compliance with this condition is not discretionary with the bank or with the comptroller, and, as in the case at bar, it was never fulfilled, and that fact was fraudulently and successfully concealed from the plaintiff in error until the bank failed so that he never waived the condition, he cannot, in my opinion, be justly held liable for any of the debts of this bank. I think the judgment below should be reversed.

Filed October 3, 1898.

43 (*Judgment.*)

And on the third day of October, A. D. 1898, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

MONDAY, *October* 3, 1898.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error. } No. 1026.

In error to the circuit court of the United States for the western district of Missouri.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, have and recover against George H. Scott the sum of twenty dollars for his costs herein and have execution therefor.

October 3, 1898.

And on the eighteenth day of September, A. D. 1899, a certified copy of stipulation and order of substitution in circuit court was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant.

44 *Stipulation.*

It is hereby stipulated in the above-entitled action that Parry L. Deweese has been heretofore duly appointed receiver of said First National Bank of Sedalia, Missouri, in place of said W. A. Latimer, and that said court may make an order substituting said Parry L. Deweese for said W. A. Latimer as plaintiff herein and directing that the title to said action be "Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant," instead of "W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant."

And it is further stipulated that a copy of this stipulation and of said order may be certified by the clerk of the above-named court to the U. S. circuit court of appeals for the eighth circuit and be

made a part of the record in this case of said circuit court of appeals.

WM. S. SHIRK,
Attorney for Plaintiff, W. A. Latimer, Receiver, etc., and for Parry L. Deweese, Receiver, etc.
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Defendant.

Dated August 25, 1899.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Plaintiff,
vs.
GEORGE H. SCOTT, Defendant. } Order.

Upon reading and filing the foregoing stipulation between the parties to the above-entitled action, it is—

Ordered that Parry L. Deweese be, and he is hereby, substituted for said W. A. Latimer as plaintiff herein, and that the title to said action be "Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant," instead of "W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, plaintiff, *vs.* George H. Scott, defendant."

45

It is ordered further that a copy of this order and said stipulation be certified by the clerk of this court to the U. S. circuit court of appeals for the eighth circuit as a part of the record in said case.

JNO. F. PHILIPS, *Judge.*

Dated September 2d, 1899.

WESTERN DISTRICT OF MISSOURI, ss:

I, Henry C. Geisberg, clerk of the circuit court of the United States for the central division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the stipulation and order in the case therein mentioned this day filed in my office.

In testimony whereof I have hereunto set my hand and affix the seal of said court, at office, in the city of Jefferson, Mo., this 5th day of September, A. D. 1899.

[SEAL.]

H. C. GEISBERG, *Clerk.*

Endorsed: No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, etc. Certified copy — stipulation and order of substitution in circuit court. Filed Sep. 18, 1899. John D. Jordan, clerk.

And on the eighteenth day of September, A. D. 1899, a stipulation and order substituting Parry L. Deweese as defendant in error

was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

46 GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

It is hereby stipulated in the above-entitled action that Parry L. Deweese has been heretofore duly appointed receiver of said bank instead of said W. A. Latimer, and that said court may make an order substituting said Parry L. Deweese for said W. A. Latimer as defendant in error herein, so that the title of said action be "George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error," instead of "George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver of the First National Bank of Sedalia, Missouri, defendant in error."

WM. S. SHIRK,
Attorney for Defendant in Error and for Parry L. Deweese, Receiver, etc.
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Plaintiff in Error.

Dated August 25, 1899.

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
W. A. LATIMER, Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

Upon reading and filing the foregoing stipulation between the parties to the above-entitled action, it is—

Ordered that Parry L. Deweese be, and he is hereby, substituted for said W. A. Latimer as defendant in error herein, so that the title of said action be "George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error," instead of "George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver of the
47 First National Bank of Sedalia, Missouri, defendant in error."

WALTER H. SANBORN,
Circuit Judge.

Dated September 18, 1899.

Endorsed: No. 1026. George H. Scott, plaintiff in error, *vs.* W. A. Latimer, receiver, etc. Stipulation and order substituting Parry L. Deweese as defendant in error. Filed Sep. 18, 1899. John D. Jordan, clerk.

(*Bond.*)

And on the twenty-fifth day of September, A. D. 1899, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
PARRY L. DEWEESE (Substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error. } Bond.

Know all men by these presents that we, George H. Scott, as principal, and National Surety Company of New York, as sureties, are held and firmly bound unto Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, in the full and just sum of two hundred and fifty ($250.00) dollars, to be paid to the said Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, or his successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6 day of September, in the year of our Lord one thousand eight hundred and ninety-nine (1899).

48 Whereas lately, at the May, 1898, term of the above-entitled court, in a suit pending in said court between George H. Scott, plaintiff in error, and Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error, a judgment was rendered against the said George H. Scott, and the said George H. Scott has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, citing and admonishing him to be and appear in the United States Supreme Court, at the city of Washington, D. C., thirty (30) days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said George H. Scott shall prosecute said writ of error to effect and answer all costs if he fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

GEO. H. SCOTT. [SEAL.]
NATIONAL SURETY COMPANY, [SEAL.]
By MAURICE AUERBACH,
Resident Vice-President.

Attest: W. S. McCURDY, [SEAL.]
Resident Ass't Secretary.

Sealed and delivered in presence of—
WM. H. VORIS.
E. L. BUNKER.
C. T. GIFFORD.
L. F. HOLCOMBE.

STATE OF CALIFORNIA, } ss:
County of San Bernardino, }

Be it known that on the 6th day of September, A. D. 1899, personally appeared before me George H. Scott, to me known to be the same person described in and who executed the foregoing bond, and acknowledged the same to be his own free act and deed.

[SEAL.] C. T. GIFFORD,
Notary Public, San Bernardino County, California.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

49 On this 13th day of September, 1899, before me, personally appeared William S. McCurdy, resident assistant secretary of the National Surety Company, the above-named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he is resident assistant secretary of said corporation, the National Surety Company; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal; that it was affixed by order of the board of directors of said corporation; that the internal-revenue stamps affixed to said instrument, exclusive of the fifty-cent stamp affixed thereto and canceled by the principal in said instrument named, is equal in amount to one-half of one per cent. on each dollar or fractional part thereof of the amount of premium charged by said corporation as the surety on said instrument, and that he signed said instrument as resident assistant secretary of said corporation by like authority; and the said William S. McCurdy further said that he is acquainted with Maurice Auerbach and knows him to be resident vice-president of said company; that the signature of said Maurice Auerbach subscribed to the said instrument is the genuine handwriting of the said Maurice Auerbach and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said William S. McCurdy, resident assistant secretary; and the said William S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] L. F. HOLCOMBE,
Notary Public, Ramsey County, Minnesota.

Financial Exhibit of the National Surety Company of New York as of March 31st, 1899.

Assets.

U. S. Government bonds	$66,450.00
New York city bonds	811,770.00
Brooklyn city bonds	71,075.00
A., T. & S. F. R'y Co. bonds	81,625.00
Mortgage loans (first liens)	44,775.00
Advance on contracts guaranteed; secured by mortgages and cash payments assigned to the company	97,706.24

50	Cash in banks	86,272.50
	Net premiums in course of transmission	98,522.86
	Accrued interest on investments	12,941.22
		$1,371,137.82

Liabilities.

Capital	$500,000.00
Claims in process of adjustment	27,591.04
Special reserve for contingent claims under reinsurance contract	21,000.00
Trust funds and all other liabilities	47,267.12
Reinsurance reserve as required by law	241,619.83
Net surplus	533,659.83
	$1,371,137.82

STATE OF MINNESOTA, } ss:
County of Ramsey, }

William S. McCurdy, of St. Paul, Minn., being duly sworn, deposes and says that he is resident assistant secretary of the National Surety Company of New York, and that the above and foregoing is a full, true, and correct statement of the financial condition of said company on the thirty-first day of March, A. D. 1899, as the same remains on file in the office of the Attorney General of the United States.

Subscribed in my presence and sworn to before me this 13th day of Sept., A. D. 1899.

[SEAL.]

L. F. HOLCOMBE,
Notary Public, Ramsey County, Minnesota.

Endorsed: United States circuit court of appeals. George H. Scott *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. The within bond is hereby approved. Brown, associate justice of the Supreme Court of the U. S. Filed Sep. 25, 1899. John D. Jordan, clerk. Hiram F. Stevens and Haydn S. Cole, att'ys for Geo. H. Scott.

51 (*Assignment of Errors.*)

And on the twenty-fifth day of September, A. D. 1899, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Supreme Court of the United States.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
PARRY L. DEWEESE (Substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

Assignment of errors.

In the above-entitled proceedings in error from the United States circuit court of appeals, eighth circuit, the plaintiff in error makes the following assignments of error:

First. That the court erred in holding that where the stockholders of a national bank decide, with the approval of the comptroller, to increase the capital stock therein by a named amount, the clause of Revised Statutes, chapter 5142, to the effect that no increase shall be valid until the whole amount is paid in does not create a condition, express or implied, that shares subscribed and paid for in full are not to be held valid unless the entire amount of the proposed increase is subscribed and paid for in full, but refers only to the actual increase created by a subscription for a given number of shares, which must be paid for in full to render it valid.

Second. The court erred in holding that the amount of the proposed increase decided upon and approved by the comptroller merely fixes the maximum increase authorized, and each subscription thereto when paid up in full becomes valid and binding until such maximum is reached.

Third. The court erred in holding that the liability of a stockholder in a national bank for assessments made by the comptroller on its insolvency is not dependent upon the contract of subscription between the stockholder and the corporation, but is created by statute for the benefit of the bank's creditors, and can neither be
52 modified nor released by any act of the corporation.

Fourth. The court erred in holding that one who has been induced by false representations of its officers to subscribe to the increased stock of a national bank, though without knowledge of the fraud or means of ascertaining it, cannot after the bank has been placed in liquidation exercise his option to rescind the contract of subscription as against the bank's creditors.

Fifth. The court erred in holding that the facts alleged in the answer did not constitute a defense to the cause of action stated in the complaint.

Wherefore the plaintiff in error asks and prays that your honorable court, the Supreme Court of the United States, reverse the judgment in this case.

HIRAM F. STEVENS,
HAYDN S. COLE,
Attorneys for Plaintiff in Error.

Endorsed: United States Supreme Court. George H. Scott *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Assignment of errors.

Filed Sep. 25, 1899. John D. Jordan, clerk. Hiram F. Stevens & Haydn S. Cole, attorneys for plaintiff in error.

(*Petition for Writ of Error.*)

And on the twenty-fifth day of September, A. D. 1899, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

Supreme Court of the United States.

GEORGE H. SCOTT, Plaintiff in Error,
vs.
PARRY L. DEWEESE (Substituted for W. A. Latimer), Receiver of the First National Bank of Sedalia, Missouri, Defendant in Error.

To the honorable judges of the United States Supreme Court:

53 Your petitioner, George H. Scott, would most respectfully represent as follows:

That in a certain action of law heard and determined in the United States circuit court of appeals, eighth circuit, wherein your petitioner was plaintiff in error and W. A. Latimer, as receiver of the First National Bank of Sedalia, Missouri, was defendant in error, judgment was rendered in favor of said defendant in error and against your petitioner at the May term, 1898, of said circuit court of appeals, and said judgment was rendered on the 3rd day of October, 1898.

That heretofore said Parry L. Deweese has been duly substituted for said W. A. Latimer as defendant in error herein.

That your petitioner further represents that there are manifest errors in the records and proceedings in said case in said circuit court of appeals which your petitioner desires to be by your honors examined, corrected, and adjudged what of right, according to the laws and customs of the United States, should be done therein in the premises; and accordingly your petitioner prays that your honors will grant, issue, and award a writ of error out of this honorable court, directed to the honorable judges of the United States circuit court of appeals, eighth circuit, commanding them to send to your honorable court the records and proceedings aforesaid, with all things concerning the same, together with said writ, that your honorable court may examine the same and pronounce judgment therein as in the judgment of your honorable court is right and proper in the case, and that you issue a citation to the said Parry L. Deweese (substituted for W. A. Latimer), as receiver of the First National Bank of Sedalia, Missouri.

HIRAM F. STEVENS,
HAYDN S. COLE,
Attorneys for Petitioner.

Endorsed: United States circuit court of appeals, eighth circuit. George H. Scott *vs.* Parry L. Deweese (substituted for W. A. Latimer),

receiver of the First National Bank of Sedalia, Missouri. Petition for writ of error. Filed Sep. 25, 1899. John D. Jordan, clerk. Hiram F. Stevens & Haydn S. Cole, attorneys for petitioner.

54 (*Writ of Error.*)

And on the twenty-fifth day of September, A. D. 1899, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between George H. Scott, plaintiff in error, and Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1026. George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Writ of error. Filed Sep. 25, 1899. John D. Jordan, clerk.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this twenty-ninth day of September, A. D. 1899.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

56 (*Citation.*)

And on the twenty-ninth day of September, A. D. 1899, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned:

57 UNITED STATES OF AMERICA, *ss:*

To Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein George H. Scott is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 23d day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

STATE OF MISSOURI, *County of Pettis, City of Sedalia,* } *ss:*

I hereby acknowledge that a copy of the within citation was this day delivered to me. Witness my hand, as attorney for the defendant in error, this the 28th day of September, A. D. 1899.

WM. S. SHIRK,
Attorney for P. L. Deweese, Def't in Error.

[Endorsed:] Original, No. 1026. George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Citation. Filed Sep. 29, 1899. John D. Jordan, clerk.

58 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-seven pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri, No. 1026, as fully as the same remain on file and of record in my said office.

I do further certify that the original writ of error and the original citation, with acknowledgment of service endorsed thereon, are each hereto attached and herewith returned.

I do further certify that on the third day of December, A. D. 1898, a mandate was issued out of the clerk's office of said circuit court of appeals, in accordance with the judgment of said court, directed to the judges of the circuit court of the United States for the western district of Missouri.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at my office, this twenty-ninth day of September, A. D. 1899.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[10-cent U. S. internal-revenue stamp, canceled Sept. 29, '99. J. D. J.]

Endorsed on cover: File No., 17,546. U. S. C. C. appeals, 8th circuit. Term No., 148. George H. Scott, plaintiff in error, *vs.* Parry L. Deweese (substituted for W. A. Latimer), receiver of the First National Bank of Sedalia, Missouri. Filed October 23, 1899.